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CODIFICATION AND JUDGE-MADE LAW: A PROBLEM OF COEXISTENCE

THE HONORABLE MR. JUSTICE SCARMAN†

It is by now generally recognized that the Law Commissions Act of 1965¹ is a milestone in the development of our law. The English legal world can never be quite the same again: as a channel tunnel will destroy even the fiction of geographical insularity, so has this statute destroyed the fiction of the common law's isolation from the practice and thinking of other legal systems. Let me explain to you, very briefly, why I make this sweeping assertion. First, the act is itself concerned with two systems of law: it sets up a Scottish Law Commission² as well as the Law Commission for England.³ Secondly, in imposing upon the two Commissions the duty "to take and keep under review all the law with which they are respectively concerned,"⁴ it requires them, amongst other things, "to obtain such information as to the legal systems of other countries" as appears to them desirable⁵ and, in particular, to "act in consultation with each other."⁶

In our approach to codification, it is well to remember the emphasis put by the act upon the need to compare our legal solutions with those of Scotland and other countries. It is, of course, a fallacy to think that the common law has ever in fact ignored the work of others: the reception of the law merchant, the importance attached to Pothier, the recurring references to Roman law, and—dare I say it—that well-known Scottish case *Donoghue v. Stevenson*,⁷ are practical manifestations of its willingness to learn from others. There is, however, now a significant difference: an act of Parliament requires comparative legal study as part and parcel of the process of the law's development and reform. This is, indeed, a channel tunnel linking our legal world with that of Europe and all stations beyond; and within our own island it establishes between Edinburgh and London a legal motor way in place of the lordly and parliamentary maze which has hitherto provided the only communication

† This speech was delivered by Mr. Justice Scarman on October 20, 1966, at Birmingham University, Birmingham, England.

‡ Chairman, Law Commission of England.

1. Eliz. 2, ch. 22 (pt. I 1965).

2. Sec. 2.

3. Sec. 1.

4. Sec. 3(1).

5. Sec. 3(1)(f).

6. Sec. 3(4).

7. [1932] A.C. 562 (Scot.).

between our two systems.

My metaphor is, of course, an echo of a phrase used by Lord Justice Diplock in a recent judgment:

I agree that this appeal should be allowed although the legal route which has led me to this conclusion is not at all points identical with that traversed by the Master of the Rolls. After all, that is the beauty of the common law; it is a maze and not a motorway.⁸

If the common law, by which I think the learned Lord Justice meant judge-made law, is a maze, then, however beautiful, it stands little chance of survival today. Speed, accessibility, and convenience are as powerfully demanded of the law as they are of the road system. How can we "simplify and modernize" the law, as the act requires, and yet allow judge-made law to remain, if in fact it is a maze? If the *raison d'être* of our case law is that it provides an attractive and amusing puzzle, the men and women of the twentieth century will impatiently sweep it aside—and with it the legal profession. But judges have been known to put the judicial tongue in the judicial cheek. I suspect that Lord Justice Diplock enjoys a metaphor. And I do not propose to assume that uncoded law is as the laughing Lord Justice described it.

To return to the act, it mandates a comparative approach to the problem of the development of our law, and it contemplates codification as part of that development, the objective of which the act believes should be the "simplification and modernization" of the law.

Simplification is, of course, a relative term; the law cannot be simpler than its subject matter allows. The act recognizes this and does provide some guidance as to the way in which the process of simplification and modernization is to be carried out. The Law Commission is "to take and keep under review all the law . . . with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, [and] the reduction of the number of such enactments."⁹

Codification, it will be observed, is the first of the instruments of systematic development and reform expressly mentioned by the act. It is clear, therefore, that this statute, which inaugurates an era of law reform by planned legislative process which in turn emphasizes the value of the comparative approach, requires us to look very closely indeed at codification—what it is, its implications, its advantages, and its disadvantages.

8. *Morris v. Martin*, [1966] 1 Q.B. 716, 730.

9. Sec. 3(1).

Codification is not a term of art in English law. It was Bentham who introduced the word into the English language. Bentham contemplated not codes, governing various branches of the law and possibly co-existing with the common law, but one universal code. It was to be complete, self-sufficing, and not to be developed, supplemented, or modified except by legislative enactment. The Law Commissions Act, though far from excluding the Benthamite conception, does not require it. Indeed a close look at the wording of section 3(1) of the act reveals that it is the law in need of reform which may have to be codified, that is to say, not necessarily all the law but only such law as needs systematizing or reforming. The act therefore leaves us the choice to move by deliberate policy towards the gradual codification of the whole general law or to codify only where reform or systematization is needed. It is too early to tell which course English legal development will take. If codified law succeeds in becoming more manageable and easier to understand than the law which it supersedes, the habit of codification will spread. If it fails, codes will become part of the useless lumber of our law; practitioners and judges will look through and beyond them to the judge-made law, seeking authority and guidance, in the decisions of the court.

But, whatever course the development of our law takes, the problem of coexistence of codified law with judicial decision has to be faced. Were it possible, which it is not, for a universal code to leap overnight, like Athena armed and fully-grown, from the head of our parliamentary Zeus, Bentham's noble conception of a code as a complete digest of the laws superseding the decisions of the judges might be momentarily achieved: I say momentarily because the very first judicial decision interpreting a section of the code would begin the reinstatement of judicial decision as a law-shaping force. Indeed, unless Bentham's conception be supported by the threats of a Justinian, it has no chance in the long run at all. In defence of his "*corpus juris*," Justinian was driven to declare in a famous passage¹⁰ (which I hope you will permit me to quote in my own free translation):

We ordain that our formulation of the law, which with God's help we have composed, shall have the name of Digest or Pandects: no jurists [Bentham would add "judges"] of posterity shall dare to add their commentaries to it or by their verbosity to confuse the comprehensive clarity of the code.

Man has learned much since Justinian's time, and much, in particular, about his own limitations of foresight and in drafting technique. We

10. Codex I 17, 12.

no longer expect to be able to draft a code so complete and so clear that subsequent comment and interpretation will be unnecessary. Those of us, therefore, who are considering the question whether codification has any advantages to offer to our legal system must accept that part of our task is to solve the problem of a code's relationship with judge-made law; it is a question not of total war involving the destruction of one or the other but a study in coexistence.

Accordingly, I propose to consider codification against the background of a common law which it does not wholly supersede, and I ask you to bear in mind that the Law Commissions Act of 1965 envisages codification not as a panacea but as an instrument of systematic development and reform in those branches of law where reform is thought to be needed, that is to say, a legal world in which there may be many codes but not necessarily a fully codified world. And the act would have us judge the value of a code by the extent to which it succeeds in simplifying and modernizing the law.

What then is required of a code if it is to meet these criteria? Not universality. English law has examples of very successful codes while clinging to its distinctive character as a system of judge-made law. And the law of many European countries includes several codes, *e.g.*, a penal code, a civil code, etc. I suggest that the first essential attribute of a code is that it is enacted law, and so within its field, the authoritative source of the law. This simple truism has profound implications, some of which I shall try a little later to analyze. But not all enacted law is codification. Parliament legislates for many purposes and in many different ways. It is necessary to distinguish codification clearly from amendment, revision, and consolidation. Indeed, the second attribute of codified law will emerge when one contrasts it with other forms of legislative activity: it will then be seen, I suggest, that a code must be not only the authoritative source of law within the field of its application but the comprehensive statement of the whole law within that field. The third attribute, without which, I would submit, a code is in danger of failing to meet the act's fundamental purpose of simplifying and modernizing the law, is that within its field it declares the whole of the law brought up to date and from the moment of enactment becomes not only the authoritative and comprehensive but also the exclusive source of law.

Accordingly, I submit that, if it is to serve well the objects of the act, a code must answer to the following description:

A code is a species of enacted law which purports so to formulate the law that it becomes within its field the authoritative, comprehensive and exclusive source of that law.

The fact that it is enacted law has profound implications. Enactment gives it authority, thus differentiating it from such comprehensive statements of the law as one may find in Halsbury's *Laws of England* or in the *Restatements* prepared by the American Law Institute. A judge may reject the guidance of Halsbury, but not that of the code. But enactment is more than the imprimatur of authority: it necessarily means that the law is developed by the deliberate will of the legislature. Before it enacts the law, the legislature will feel the need for advice on the views of economists, social scientists, interested bodies, and ordinary citizens as well as lawyers. Enactment enables a scientific planning and designing process, which taps the wisdom and experience of the whole community, to be brought to bear on the formulation of the law. The Law Commission is the permanent instrument for ensuring that this planning and consultative process will be available to Parliament.

The second attribute—its comprehensiveness—distinguishes a code from other forms of legislation. The point is more important than it appears, for many common lawyers do confuse codification with consolidation. Indeed the same confusion bedevils the contemporary vocabulary of civil law systems. Codification may well include amendment, revision, and consolidation, but each is a separate technique to which Parliament may have resort without going so far as to codify the law. Parliament may, and often does, amend without attempting a comprehensive statement of the law; it leaves the general body of the law, whether statute or judge-made, intact. Revision and consolidation are techniques of law reform, which find a mention in the Law Commissions Act of 1965, but which differ in material respects from codification. Revision, as practised in England, is a process whereby obsolete and unnecessary enactments are removed from the statute book. Consolidation is the technique whereby existing statute law on a given topic is reduced from many statutes into one without altering the substance of the law. Thus, codification will almost invariably include revision and consolidation; but it is something more, for it purports not only to revise, rearrange, and restate existing statute law but to formulate comprehensively—with amendments, if necessary—all the law within its field, whether the law's historical source be statute, or custom in the shape of judicial decision.

Thirdly, there is the exclusive character of a code. A code must be at the moment of enactment the exclusive source of law within its field, simply because, unless it purports to exclude all other sources, it is in danger of failing to develop or reform. English lawyers have sometimes failed to grasp the nature of a code as an instrument of development and reform. For instance, C. K. Allen has defined a code as, in the main,

an enactment declaratory of existing law, *i.e.*, no more than a restatement of the law enjoying the authority of statute.¹¹ No doubt, this is a permissible use of a word which, as I have mentioned, is not a term of art in our law. But it is not the sense, I submit, in which the term is used in the Law Commissions Act, where codification is listed as one of the instruments of development and reform. Neither is it the meaning which English courts have attributed to codified law. Two well-known quotations will suffice. Discussing the Bills of Exchange Act of 1882, Lord Herschell said in *Vagliano v. Bank of England*:¹²

The proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law; and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

Speaking of another equally famous common law codification, the Sale of Goods Act of 1893, Lord Alverstone used these words:

I think it is very important to bear in mind that the rights of people in regard to these matters depend now upon statute. To a large extent the old law, I will not say has been swept away, but it has become unnecessary to refer to it.¹³

Perhaps Lord Alverstone hedges a little, but he does not really derogate from the unconditional language of Lord Herschell in the House of Lords. If, therefore, codification should indeed be a law-making process where the legislature declares a fully developed law, the Bills of Exchange Act is an example in the English statute book of such codification, though it contains in section 97 a saving of the rules of common law including the law merchant in so far as they are not inconsistent with the provisions of the act. Similar savings will be found in other English codes, *e.g.*, the Partnership Act, and the Sale of Goods Act. These statutes—in particular the Bills of Exchange Act and the Sale of Goods Act—are worthy examples of codification in that they do purport, notwithstanding their savings clauses, to declare a fully developed law within their field. Further, as the two dicta I have cited show, they have been interpreted in that sense.

Though the words "code" and "codification" are, in truth, humpty-

11. ALLEN, LAW IN THE MAKING 476 (7th ed. 1964).

12. [1891] A.C. 107, 145.

13. Wallis v. Pratt, [1911] A.C. 394, 398.

dummy words, I trust I have made clear the sense in which I think those concerned with advancing the purpose of the Law Commissions Act should use them. And I submit that our courts have lent some support to my view and that the statute book already contains some enactments which meet the criteria of codification that I have tried to formulate.

I hope, therefore, that you will allow me to consider the problem of the coexistence of codification as I have described it with our traditional judge-made law. In a purely technical sense, this might be said to be a problem of statutory interpretation. That problem itself has several facets. I will mention a few. It is necessary to determine the extent to which prior case law may be relied on to explain the code and again, it is necessary to determine what latitude the judge is to be given interpreting the code and what authority is to be ascribed to judicial interpretations. But, if codification comes, it may well be that, whatever the answers to such questions, the judges will continue, though perhaps less obviously, to be an important law-shaping force. Indeed, I suspect that we must assess the future position of the judge as a lawmaker rather on the basis of the experience of other systems than upon a discussion of the technicalities of statutory interpretation.

Lord Devlin, in his recent address to the Law Society at Eastbourne,¹⁴ spoke of the future of English law. He saw the work of the Law Commission as beginning with the task of major codification and thereafter becoming that of the constant repair and renovation of the codes created. He prophesied that, if successfully accomplished, it would "ease and diminish the work of the appellate courts. It will result also [he continued] in the appellate courts playing a much less important part in the life of the law." Myself, I doubt whether the courts will find themselves much diminished in importance as makers of law, but I agree that their contribution will change. They will lose their priestly character as oracles drawing from within upon the experience of themselves and their predecessors in office to declare the law; they will stand forth as the authoritative interpreters of the code. For the code will ultimately mean what the judge says it means. Already our courts spend most of their time interpreting statute law. In truth, an English judge is already almost in like case with his continental brother, whose function is to interpret and apply enacted law. If codified law becomes the general rule, his role will be the same. Yet, if there is one really noticeable trend in the codified systems of Europe, it is the growth in importance of judicial decision, confined though it is to interpretation.

Contrast the theory and practice of French law, *e.g.*, the five short

14. "A Code of English Law?", Hull University, February 25, 1966.

articles of the French Civil Code which declare the French law of delict,¹⁵ with the voluminous development of the law by the professors and the judges. No wonder the sixth lesson of Mazeaud, *Lecons de Droit Civil*, contains these words:

Case law has become in France a source of law of considerable importance, although it is forbidden to judges to make law; that is to say, although their decisions have binding authority only in the particular cases in which they are given.¹⁶

All this has happened under the battle-cry of "interpretation." The contrast between theory and practice stares at one starkly if one compares the language of Article 5 of the Code with the comments of Julliot de la Morandière.

Article 5 declares:

The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them.

Julliot de la Morandière, under the heading *La jurisprudence. Son rôle capital* makes the following comments:

Without doubt . . . the judges do not make law, but only apply it. But in that function the courts play, and have played since the promulgation of the 'code civil' a considerable rôle.

- (a) They have given to the law precision . . .
- (b) they have filled the gaps . . .
- (c) they have adapted the texts of the code to modern needs . . .
- (d) they have preceded and prepared the way for legislative development.¹⁷

What a wealth of judicial power resides in these words, and how greatly and legitimately it has been exploited. As Mazeaud eloquently and significantly comments, "*la jurisprudence est pour la loi la fontaine de jouvence*,"¹⁸ which I translate, the courts carry with them the secret of the law's eternal youth.

There is nothing surprising in the continuing importance of the judge in a codified system. However carefully drafted, into whatever detail it goes, a code is likely in places to fall into the error of ambiguity and is bound to contain some omissions. If it be ambiguous, yet the

15. Arts. 1382-86.

16. 1 MAZEAUD, *LECONS DE DROIT CIVIL* 116 [1955].

17. 1 MORANDIERE, *DROIT CIVIL* 86 (3d ed. 1963).

18. 1 MAZEAUD, *op. cit. supra* note 16, at 130.

judge's decision must be certain; if it fail to cover the case under consideration, yet the judge must make a decision. The cry "*non possumus*" is simply not open to a judge. Thus, the very limitations of a code invite the cooperation of the judge, and, whether it is desirable or not, every time a judge resolves an ambiguity or fills what is in effect, though possibly not in theory, a gap he will be creating law. It is inconceivable that an English lawyer will find it any easier than his French brother, whatever the code says, to deny a place in the shaping of the law to the courts—even if in legal theory their decisions should be no more than exercises in statutory interpretation. And this is likely to be true, even though we refrain from going as far as Article 1-2 of the Swiss Civil Code which provides:

In default of an applicable provision, the judge will decide according to the customary law: and, in default of a custom, according to the rules which he would have established had he been the legislator.

For these reasons I expect that, as the codification of our law proceeds, the judge's role will change, but hardly diminish in importance. The health of our law will, indeed, largely depend upon the way in which its codes are interpreted by the judges. Statutory interpretation is too big a problem for me to consider in detail here. I would hope that it would be the policy of our law to apply, as it is put in New Zealand, a "fair, large and liberal interpretation." But the courts would be required, I suggest, to treat the code as the exclusive source of the law. I have already shown how there is nothing revolutionary or inimical to the common law tradition in restraining the courts from interpreting a code in the light of the earlier case law. If a code is, in the words of the Law Commissions Act, to effect a simplification and modernization of the law, it must be freed of the shackles of the obsolete law which it is designed to supersede. The courts must start with the code and not attempt to go behind it. In truth, it will be a great convenience to provide the judges with one and the same starting point instead of asking them to choose their own from the 300,000 reported cases, or whatever is the sizeable fraction of that grand total which represents the case law on the subject under consideration. It must be a clear advantage that they all start at the same point—the code—wherever they may end up and whatever legal route (motorway or maze) they choose to take from that point onwards.

I come now to the question of what sort of code is likely to come—one replete with detailed provisions or one confined to general declara-

tion. History provides us with examples of both. The French Civil Code meets the Cromwellian requirement of sizes; it is sufficiently short to be contained within "the bigness of a pocket-book." The German Civil Code is more formidable—2,385 sections; the Swiss, on the contrary, have a short generalized code. What should we choose?

It is pertinent to remember we are codifying piecemeal, *i.e.*, preparing codes, not one digest of all the law. It is likely that the character of each code will be determined not so much by theoretical considerations as to the nature of codified law but by the subject matter of the particular branch of law being codified. Nevertheless, any codification may find itself impaled upon the horns of a dilemma. If it is to be simple and easily understood, it will in eschewing detail attract so much subsequent case law that it will rapidly lose any practical importance as a source of law: the history of Articles 1382-86 of the French Civil Code is an object lesson. It was such a fate that Bentham had in mind when he called for codification in great detail. It was his view that:

the code having been prepared, the introduction of all unwritten [*i.e.*, not enacted] law should be forbidden.¹⁹

But, if the code be detailed, will it not lose the qualities of brevity, intelligibility, and accessibility to which the advocates of codified law attach importance?

The escape from the dilemma is to be found, I suggest, by concentrating attention on subject matter. Complex social conditions, of course, necessitate complex laws. It is disingenuous to ask of law that it should be simple, when its subject matter is not. The problem becomes one of degree. In certain branches of the law, *e.g.*, contract, property, and criminal law, the ordinary citizen requires guidance. He enters into business agreements; he buys and sells; he owns property; he has to determine his personal conduct in society. In these fields it is not merely the judge who wants to know how to decide his case; it is the ordinary citizen who without recourse to litigation has to regulate his dealings and his conduct. In such branches of the law the code must condescend to detail, thus ensuring that its provisions are not overlaid by judicial decision which, by and large, will be accessible only to the legal profession. But where the law is concerned more to provide a remedy than to chart a course, *e.g.*, in the law of negligence or, I would suggest, in a properly developed administrative law, less detail is needed, and a wider discretion may be left to judicial decision. But, whatever the degree of detail, the

19. Similar language appears in III WORKS OF JEREMY BENTHAM 209 (Bowring ed. 1843).

code must be such that in its field of application it is in practice as well as in theory the authoritative and exclusive source of law.

How is this to be achieved? How are we to ensure that subsequent case law remains the servant of the code and is prevented from becoming its master? First, the point I have already made, the judges of the future must not burrow into the earlier law; the code's object is to simplify and modernize—tasks difficult enough without the encumbrance of ancient law. Judges must accustom themselves to beginning with the code and staying with it. Secondly, principles of a fair, large, and liberal interpretation must be worked out and applied. But the interpretation must not be allowed to overlay the codified law. Legal machinery will be required to prevent this process. Bentham's simple solution, based on the French revolutionary precedent of *refere legislatif*, was this:

If a judge or advocate thinks he sees an error or omission, let him certify his opinion to the legislature with the reasons for his opinion and the correction he would propose.²⁰

His solution may yet turn out to have been institutionalized by the setting up of the Law Commission. For it will be the Law Commission's duty to keep watch over the codes Parliament has enacted, to recommend correction where judicial interpretation reveals ambiguity or omission, and to repair and renovate. Undoubtedly, if left to itself, judicial interpretation will ultimately overlay the code, whatever the theory of the law. But if an effective cooperation between judges, Law Commission, and Parliament be established, the codified law can be developed, corrected, and modernized by a planned legislative process which will rely not on the legal profession alone but on the skills and values of the whole community.

I have, in the foregoing, attempted to sketch out the nature of codification as that term appears to be used in the Law Commissions Act of 1965 and to consider some of its implications for our legal system. It would undoubtedly involve an important departure from traditional attitudes. It would, in theory, revolutionize the position of the judges, though in practice they would remain of great influence in the development of the law. The doctrine of precedent, whose bonds have this year been mercifully loosened, would have to yield, and judicial decision would have to accept a world in which, unless it was persuasive, it would be rejected. All this would be a wrench: is it worth while? If one is weighing up the advantages and disadvantages of judge-made and codified law, are there not great advantages in the slow, maturely considered advance

20. Similar language appears in *id.* at 210.

of the law, case by case, which is within the gift of the judges, and the judges alone?

I have elsewhere developed my reasons for believing that, great as has been the contribution of judicial decision to the development of our law, it can no longer carry the load. Furthermore, I suggest, it is really a perversion of the judge's function in society that he should be requested to do so; his task is to decide particular cases, not to make but to apply the law. Some of the difficulties of judge-made law have recently been described by Lord Devlin in the address to which I have already referred.²¹

The trouble about judicial law reform was never, as it is with Parliament, lack of time but lack of opportunity—that and the multiplication of courts of appeal. When Lord Mansfield laid down the law, new law was created more or less from the moment he said it. But since his time the delay before a point of principle reaches the House of Lords may be so long as to out-distance by ten times or more the parliamentary process.²²

Then again he pointed out that the judge's opportunity to make law depends upon a litigant, and

without a litigant the process cannot start and adventurous litigants with an enthusiasm for law reform are not easily come by.²³

I would add a further objection. Judge-made law is law made by lawyers. In the complex, wide-ranging social structure which constitutes the community of today, are we really prepared to allow the development of our law to be in the hands of one profession, supplemented spasmodically by limited incursions into the field of law reform on those rare occasions when Parliament is frightened, persuaded, cajoled, or deceived into finding time for a subject so electorally unappealing?

If it be right that a modern legal system can no longer rely upon our traditional methods of legal development, codification becomes urgent, practical politics. What are, in truth, its benefits?

You may think that I have been unable to prevent them from obtruding themselves into my analysis of what it is. Very briefly, I see them to be:

- (1) The codifying process gives society the opportunity to simplify and modernize the law. In *Lady Windemer's Fan* Lord Augustus said, "to be intelligible is to be found out." Even that is

21. See note 14 *supra* and accompanying text.

22. DEVLIN, *supra* note 14, at 13.

23. *Id.* at 15.

an advantage in the development of the law; error, once recognized, can be corrected.

- (2) It enables the development of the law to be planned—to move to a design acceptable to contemporary society.
- (3) It can provide, if well done, a compact, accessible, and complete formulation of the law.
- (4) It can be subjected to continuous review and revision: its anomalies need not await the necessarily haphazard opportunities of judicial correction.
- (5) Through Parliament and the Law Commission, it involves the whole community in the process of legal development.

Let me conclude this list of benefits with three quotations, which derive their persuasiveness from the authority of their authors. Maitland, speaking of the raw material of German law before its codification in 1900:

But all this stuff, wheresoever obtained, has recently been passed through modern minds, has been debated, criticized, revised; and an endeavour has been made to present it as a single, coherent, homogeneous whole. Could anything of the same sort be said of us? Are we facing modern times with modern ideas, modern machinery, modern weapons? I wish I could think so. Some of our ideas seem to be inadequate; some of our machinery seems to me cumbrous and rusty; some of our weapons I would liken to blunderbusses, apt to go off at the wrong end.²⁴

Justice Stephen:

The only thing which prevents English-speaking people from seeing that the law is really one of the most interesting and instructive studies in the world is that English lawyers have thrown it into a shape which can only be described as studiously repulsive.²⁵

Lord Cooper, of Scotland:

Whatever the abstract merits or demerits of codification, it is undeniable that it is the systems codified and applied on the civilian principle which have spread far and wide throughout the modern world as a result of voluntary imitation and free adoption. . . . Despite our powerful Romanist tradition we in Scotland have never yet codified, but we possess our great institu-

24. 3 MAITLAND, COLLECTED PAPERS 485 (Fisher ed. 1911).

25. Quoted in HART, WAY TO JUSTICE 40 (1941).

tional treatises by Stair, Erskine, and Bell. . . . For us complete codification would present no insuperable difficulty; and, but for the political and economic consequences of the union . . . in 1707, we should unquestionably have codified long ago.²⁶

Is all this a day dream? Will Parliament, never noticeably eager to find time even for measures of limited law reform, find time, for instance, for the codification of the law of contract or the criminal law or family law? The practical answer depends upon the extent to which the Law Commission succeeds in winning the confidence of Parliament. If Parliament is persuaded that the Commission's legislative proposals are based upon accurate research, wide and relevant consultation extending to those whose interests are affected as well as to those who have skills and experience, non-legal as well as legal, to contribute, it should be possible to devise procedure whereby the social principles but not the legal details of a codifying bill are alone debated. An extension of the sort of machinery which enables consolidation bills to pass into law without fuss might well be introduced. Why not a joint committee on codification bills? If the bill passed its scrutiny, Parliament could debate the main issue without allowing amendments to be moved. Meanwhile, it is encouraging that Parliament has by the Law Commissions Act of 1965 pointed the way for the systematic development of our law by planned legislative process and established in the two commissions the necessary machinery. I do not believe Parliament will frustrate its own machinery or betray its own cause.

In 1960 a learned writer used these words:

Very little need be said about codification because it is not a live issue in this country at the present time.²⁷

He was, of course, writing in Oxford. But his words were true enough in 1960. He went on to say that it was difficult to believe it would not become a live issue within the next fifty years or so. He was right: it became a live issue in 1965, and the English legal scene has undergone a historic change. The law is on its way to modernity.

26. 63 N.L.R. 468.

27. CROSS, PRECEDENT IN ENGLISH LAW 197-99 (1960).